

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: March 2, 2009
CIN #: [REDACTED]
CENTER #: HCSP
FH #: 5230170H

In the Matter of the Appeal of
[REDACTED]
[REDACTED]

:
: **DECISION**
: **AFTER**
: **FAIR**
: **HEARING**
:
:

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on August 12, 2010, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[REDACTED]

For the Social Services Agency

Mark Miller and Gloria Raja, Representatives, on April 23, 2009
Sandy Milligab and Florence Levin, Representatives, on June 30, 2009
Sindy Lam and Stacey Sundar, Representatives, on April 29, 2010
Tanza Pettiford and Theresa Sandoval, Representatives, on June 8, 2010
Melvin Reveron, Ralph Young, Esq., and Florence Levin, Fair Hearing Representatives, on August 2010

ISSUES

Was the Agency's determination dated November 4, 2009 to reduce the Appellant's Personal Care Services authorization from the amount of 24 hours daily, 7 days weekly, "split-shift" service, provided by more than one Personal Care Services aide to the amount of 24 hours daily, 7 days weekly, provided on a "sleep-in" basis, correct?

Was the Agency's determination as to the adequacy of the Appellant and the Appellant's wife's Personal Care Services, correct?

FACT FINDING

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant, age 88, and the Appellant's wife [REDACTED], age 83, had been authorized to receive Personal Care Services under a mutual case in the authorized amount of 24 hours daily, 7 days weekly, provided on a "sleep-in" basis.

2. By Notice dated December 17, 2008, the Agency advised Appellant and his wife of the Agency's determination to discontinue Appellant's and his wife's Personal Care Services, effective January 2, 2010, because the Appellant's and his wife's needs could no longer be met by means of the Personal Care Services Program.

3. On February 3, 2009, the Agency advised Appellant and his wife of its determination to again authorize Personal Care Services for Appellant and his wife, commencing January 29, 2009. The Agency determined to continue the previously authorized hours of 24 hours daily, 7 days weekly, "sleep-in" service.

4. Effective on or about March 27, 2009, the Agency reduced the Personal Care Services authorization of Appellant and his wife to 12 hours daily, 7 days weekly.

5. On March 2, 2009, Appellant's daughter and attorney-in-fact, on behalf of Appellant, requested the present hearing to review the reduction in and adequacy of the Personal Care Services hours authorized for Appellant and his wife. At the time, there was also an issue of an intended discontinuance of Personal Care Services.

6. Effective April 28, 2009, pursuant to the Office of Administrative Hearings' Order pursuant to Varshavsky v. Perales, the Agency increased Appellant's and his wife's Personal Care Services authorization to the amount of 24 hours daily, 7 days weekly, continuous care, provided by more than one Personal Care Services aide.

7. On September 29, 2009, the Appellant's physician on Appellant's behalf submitted

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physician's orders to the Agency.

8. On October 7, 2009, the Agency obtained a Nurse's Assessment on Appellant's behalf

9. On October 6, 2009, the Agency obtained a Social Assessment on Appellant's and on the Appellant's wife's behalf.

10. By NOTICE OF INTENT dated November 4, 2009, the Agency informed the Appellant of the Agency's determination to reduce the Appellant's Personal Care Services from the amount of 24 hours daily, 7 days weekly, continuous care, provided by more than one Personal Care Services aide to the amount of 24 hours daily, 7 days weekly, provided on a "sleep-in" basis on the following grounds: "You require assistance with ambulation, toileting, transferring, bathing, dressing, grooming, shampoo, feeding, meal preparation, outdoor service as well as with toileting needs."

11. On October 20, 2009, the Appellant's wife's physician on Appellant's wife's behalf submitted physician's orders to the Agency.

12. On October 22, 2009, the Agency obtained a Nurse's Assessment on Appellant's wife's behalf.

13. On November 2, 2009, the Agency obtained independent medical reviews for the Appellant and the Appellant's wife.

14. On October 22, 2009, the Appellant's daughter, [REDACTED] signed an AGREEMENT OF RELATIVE OR FRIEND TO PARTICIPATE IN HOME CARE SERVICES PLAN OF CARE by which the aforesaid relative agreed to participate in the plan of care developed by the Home Care Services Program for the Appellant and the Appellant's wife.

15. On November 4, 2009, the Agency obtained the Home Care Reviewer's Decision for the Appellant's wife.

16. By Notice of Intent dated November 4, 2009, effective November 18, 2009, the Agency advised the Appellant's wife of its determination to discontinue the Appellant's wife's Personal Care Services on the following grounds: "You try to get out of bed without asking for assistance. This will result in injuries. You require constant safety supervision and monitoring which is beyond the scope of a personal care aide."

17. The Agency's reduction and discontinuance determinations dated November 4, 2009 were added for review at this fair hearing.

18. On September 30th, 2010, the Appellant's and the Appellant's wife's legal representative contacted the New York State Fair Hearing Office and, on behalf of Appellant's wife, withdrew the wife's request for a fair hearing concerning the issue of a November 4, 2009 determination to discontinue the Appellant's wife's Personal Care Services (because the Agency

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is willing to authorize 24 hours, 7 day, "sleep-in" services). The December 2008 determination to discontinue the Personal Care Services of both Appellant and his wife is also not here at issue, as said determination was superseded by a February 2009 determination to continue services for Appellant and his wife.

APPLICABLE LAW

Section 505.14(a)(1) of the Regulations defines "Personal Care Services" to mean some or total assistance with personal hygiene, dressing and feeding; nutritional and environmental support functions; and health-related tasks. Such services must be essential to the maintenance of the patient's health and safety in his or her own home...".

New York City has received approval to deliver Personal Care Services through a Task Based Assessment methodology. Service delivery is task oriented, not time oriented, and the client continues to receive service in accordance with assessed needs.

Regulation 505.14(b)(5)(v)(b) provides:

- (b) The social services district must notify the patient in writing of its decision to authorize, reauthorize, increase, decrease, discontinue or deny personal care services on forms required by the department. The patient is entitled to a fair hearing and to have such services continued unchanged until the fair hearing decision is issued (aid-continuing) in accordance with the requirements outlined in Part 358 of this Title.

Regulations at 18 NYCRR 358-3.3(a) provide that a recipient has a right to an adequate notice when a social services agency:

- (i) proposes to take any action to discontinue, suspend, or reduce a Public Assistance grant, Medical Assistance authorization or services;

An adequate notice is a notice of action, an adverse action notice or an action taken notice which sets forth the action that the Agency proposes to take or is taking, and also:

- o for reductions, the previous and new amounts of assistance, benefits, or services provided;

18 NYCRR 358-2.2

In Mayer et al. v. Wing et al. (S.D.N.Y.), Plaintiffs challenged New York City's efforts to reduce their personal care services. The Court found that prior to issuing any reduction notice, the Agency must first identify some development that justifies altering a recipient's level of services. Specifically, the Agency was enjoined from reducing recipient's home care services unless the Agency's notice states that a reduction is justified because of any of a series of listed

reasons. Effective October 31, 2001, relevant sections of 18 NYCRR 505.14(b) were amended to include the following requirements, consistent with the Mayer decision, for Agency determinations and notices of determination to reduce or to discontinue Personal Care Services, as to reasons for the Agency to select from when issuing relevant notices:

- (1) the clients medical, mental, economic or social circumstances have changed and the district determines that the personal care services provided under the last authorization or reauthorization are no longer appropriate or can be provided in fewer hours than they were previously;
- (2) a mistake occurred in the previous personal care services authorization;
- (3) the client refused to cooperate with the required assessment of services;
- (4) a technological development renders certain services unnecessary or less time consuming;
- (5) the client can be more appropriately and cost-effectively served through other Medicaid programs and services;
- (6) the clients health and safety cannot be assured with the provision of personal care services;
- (7) the clients medical condition is not stable;
- (8) the client is not self-directing and has no one to assume those responsibilities;
- (9) the services the client needs exceed the personal care aides scope of practice; and
- (10) the client resides in a facility or participates in another program or receives other services which are responsible for the provision of needed personal care services.

Section 505.14(a)(1) of the Regulations defines "Personal Care Services" to mean some or total assistance with personal hygiene, dressing and feeding; nutritional and environmental support functions; and health-related tasks. Such services must be essential to the maintenance of the patient's health and safety in his or her own home...".

Section 505.14(a) of the Regulations provides in part that:

(2) **Some or total assistance** shall be defined as follows:

- i) **Some assistance** shall mean that a specific function or task is performed and completed by the patient with help from another individual.
- ii) **Total assistance** shall mean that a specific function or task is performed and completed for the patient.

(3) **Continuous 24 hour personal care services** shall mean the provision of uninterrupted care, by more than one person, for a patient who, because of his/her medical condition and disabilities, requires total assistance with toileting and/or walking and/or transferring and/or feeding at unscheduled times during the day and night.

(6) Personal care services shall include the following three levels of care, and be provided in accordance with the following standards:

- (i) Level I shall be limited to the performance of nutritional and environmental support functions.

- (ii) Level II shall include the performance of nutritional and environmental support functions and personal care functions.

- (a) Personal care functions shall include some or total assistance with the following:

- (1) bathing of the patient in the bed, the tub or in the shower;
- (2) dressing;
- (3) grooming, including care of hair, shaving and ordinary care of nails, teeth and mouth;
- (4) toileting; this may include assisting the patient on and off

- the bedpan, commode or toilet;
- (5) walking, beyond that provided by durable medical equipment, within the home and outside the home;
 - (6) transferring from bed to chair or wheelchair;
 - (7) preparing meals in accordance with modified diets, including low sugar, low fat, low salt and low residue diets;
 - (8) feeding;
 - (9) administration of medication by the patient, including prompting the patient as to time, identifying the medication for the patient, bringing the medication and any necessary supplies or equipment to the patient, opening the container for the patient, positioning the patient for medication and administration, disposing of used supplies and materials and storing the medication properly;
 - (10) providing routine skin care;
 - (11) using medical supplies and equipment such as walkers and wheelchairs; and
 - (12) changing of simple dressings.

Section 505.14(b) of the Regulations provides that when a social services district receives a request for personal care services, it must determine whether the individual is eligible for Medical Assistance. The initial authorization for services shall be based on :

- o a physician's order from the patient's physician based on the patient's current medical status as determined by a medical examination within 30 days of the request for Personal Care Services;
- o a social assessment which must include a discussion with the patient to determine perception of his/her circumstances and preferences, an evaluation of the potential contribution of informal caregivers, such as family and friends, to the patient's care, and consideration of the number and kind of informal caregivers available to the patient, ability and motivation of informal caregivers to assist in care, extent of informal caregivers' potential involvement, availability of informal caregivers for future assistance, and acceptability to the patient of the informal caregivers'

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involvement in his/her care. The social assessment is completed by the Agency

- o a nursing assessment. The nursing assessment is completed by a nurse from a certified home health agency or by a nurse employed by the local social services department or by a nurse employed by a voluntary or proprietary agency under contract with the local social services department. The nursing assessment must be completed within 5 working days of the request and must include the following:
 - (1) a review and interpretation of the physician's order;
 - (2) the primary diagnosis code;
 - (3) an evaluation of the functions and tasks required by the patient;
 - (4) the degree of assistance required for each function and task;
 - (5) the development of a plan of care in collaboration with the patient or his/her representative; and
 - (6) recommendations for authorization of services.
- o a home care assessment. This may be included in the social or nursing assessment.
- o an assessment of the patient's appropriateness for hospice services and an assessment of the appropriateness and cost effectiveness of a variety of other services; and

Where there is a disagreement between the physician's order and the social, nursing, and other required assessments, or there is a question about the level and amount of services to be provided, or if the case involves the provision of continuous twenty-four hour Personal Care Services (i.e., uninterrupted care by more than one person), an independent medical review of the case must be completed by the local professional director, by a physician designated by the local professional director, or by a physician under contract with the Agency to review personal care services cases, who shall make the final determination about the level and amount of care to be provided.

Section 505.14(c)(9) of the Regulations provides that each local social services department shall have a plan to monitor and audit the delivery of personal care services provided by arrangements or contracts.

New York City has received approval to deliver personal care services through a shared aide program which is called "The Cluster Care Program" in New York City. The Program is designed to deliver care to groups of clients residing in designated geographical service areas. Under the Cluster Care Program, service delivery is task oriented, not time oriented, and the client continues to receive service in accordance with assessed needs.

In Rodriguez v. City of New York, 197 F. 3rd 611 (Federal Court of Appeals, 2nd Circuit 1999), cert. denied 531 U.S. 864, the Plaintiffs were Personal Care Services recipients who alleged that, without the provision of safety monitoring as an independent task in their Personal Care Services authorizations, they would be in receipt of inadequate service not meeting legal requirements. The district court had ruled in favor of the Plaintiffs, but the Court of Appeals held that the Agency is not required to provide safety monitoring as an independent Personal Care Services task in evaluating the needs of applicants for and recipients of Personal Care Services.

General Information Service Message GIS 03/MA/03, released on January 24, 2003 by the New York State Department of Health, reads, in part, as follows:

As previously advised, social services districts are NOT required to allot time for safety monitoring as a separate task as part of the total personal care services hours authorized (see GIS 99 MA/013, GIS 99 MA/036). However, districts are reminded that a clear and legitimate distinction exists between safety monitoring as a non-required independent stand alone function while no Level II personal care services task is being provided, and the appropriate monitoring of the patient while providing assistance with the performance of a Level II personal care services task, such as transferring, toileting, or walking, to assure the task is being safely completed.

General Information System Message 97 MA/33 includes the following statement:

Remember that the contribution of family members or friends is voluntary and cannot be coerced or required in any manner whatsoever. A district may choose to implement so-called "statements of understanding" to reflect a family member's or friend's voluntary agreement to provide hours of care to a recipient whom the district has determined is medically eligible for split shift or live-in services. (See 95 LCM-76, section III, issued July 18, 1995, for a description of statements of understanding).

Varshavsky v. Perales is an action in the Supreme Court, New York County, in which Plaintiffs are challenging the 1990 decision of the Office of Administrative Hearings to suspend the provision of home hearings. A stipulation in the matter includes the provision of reasonable, requested Personal Care Services hours for home-bound Personal Care Services recipients, pending the outcome of the fair hearing.

Regulation 358-5.9(a) provides:

At a fair hearing concerning the denial of an application for or the adequacy of public assistance, medical assistance, HEAP, food stamp benefits or services; or an exemption from work activity requirements the appellant must establish that the

agency's denial of assistance or benefits or such an exemption was not correct or that the appellant is eligible for a greater amount of assistance or benefits. Except where otherwise established by law or regulation, in fair hearings concerning the discontinuance, reduction or suspension of public assistance, medical assistance, food stamp benefits or services, the social services agency must establish that its actions were correct.

DISCUSSION

The Agency's Notice of Decision dated November 4, 2009, pertaining to the reduction of the Appellant's Personal Care Services, was placed into evidence at the hearing. The notice failed to state that the intended reduction was justified by one of the reasons set out in the amended portions of Regulation 505.14(b), complying with the decision from Mayer v. Wing. That is, the Notice failed to state that the reduction was the result of:

- (1) the client's medical, mental, economic or social circumstances having changed and the district determines that the personal care services provided under the last authorization or reauthorization are no longer appropriate or can be provided in fewer hours than they were previously;
- (2) a mistake having occurred in the previous personal care services authorization;
- (3) the client having refused to cooperate with the required assessment of services;
- (4) a technological development having rendered certain services unnecessary or less time consuming;
- (5) the client being able to be more appropriately and cost-effectively served through other Medicaid programs and services;
- (6) the clients health and safety not being able to be assured with the provision of personal care services;
- (7) the clients medical condition not being stable;
- (8) the client not being self-directing and having no one to assume those responsibilities;
- (9) the services the client needs exceeding the personal care aides scope of practice; and

- (10) the client residing in a facility or participating in another program or receiving other services which are responsible for the provision of needed personal care services.

The above-listed defect renders the Agency's Notice void. Issuing said notice also violated the Office of Administrative Hearings' Directive of aid-to-continue pursuant to the Varshavsky case, directing the Agency to authorize "split-shift" services for Appellant and his wife, as no decision in the current fair hearing had been issued at the time that the Agency issued its Notice of Intent to Reduce services for Appellant and his wife.

Still, since the 24 hours continuous care service was "aid-to-continue" under Varshavsky v. Perales, some discussion of the extent of Appellant's and his wife's need for continuous care services will occur. The record developed in this case includes the Appellant's Physician Orders which indicate that the Appellant suffers from hypertension, coronary artery disease, dementia, osteoarthritis and hypercholesterolemia. Furthermore, the aforesaid Orders show that the Appellant suffers from partial speech, sight and hearing impairments; partial muscular/motor impairment in lower extremities; and partial cardiovascular/respiratory impairments in cardiac function and circulation. Also, the aforesaid Appellant's Physician Orders show that the Appellant is incontinent in bladder and bowel functions; that the Appellant cannot ambulate outside; and that he needs the assistance of person to ambulate inside; to get up from seated position; to get up from bed; transfer to commode; and to transfer to wheelchair. The record also establishes that the Appellant's Physician Orders indicate that the Appellant's Personal Care Services include total grooming, total dressing, total washing, total bathing, total feeding, as well as total toileting: Bedpan and Commode.

Moreover the record shows that the Appellant's wife's Physician Orders indicate that the Appellant's wife suffers from coronary artery disease, atrial fibrillation, dementia, congestive heart failure, gastro-esophageal reflux disease, anxiety disorder and osteoporosis. Furthermore, the aforesaid Orders show that the Appellant's wife suffers from partial speech, sight and hearing impairments; partial muscular/motor impairment in muscular coordination and in lower extremities; and partial cardiovascular/respiratory impairments in cardiac function and circulation. Also, the aforesaid Appellant's Physician Orders show that the Appellant's wife is incontinent in bladder function and occasionally incontinent in bowel function; that the Appellant's wife needs the assistance of a person to ambulate inside and outside; to get up from seated position; to get up from bed; transfer to commode; and to transfer to wheelchair. The record also establishes that the Appellant's Physician Orders indicate that the Appellant's wife Personal Care Services include total grooming, total dressing, total washing, total bathing, total feeding, as well as total toileting: Bedpan and Commode.

The Agency obtained a nurse's assessment for the Appellant. The nurse reported that the Appellant suffers from impairments in dominant hand/arm, other hand/arm, in lower extremities; that the Appellant is sometimes incontinent in bladder control but he is continent in bowel control; that the Appellant needs the assistance of a person to transfer to walk or wheel inside and outside; get up from seated position; get up from bed; and transfer to wheelchair. The record

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further shows that the nurse recommended for the Appellant's wife 26 hours daily, 7 days weekly, provided on a "sleep-in" basis.

The Agency obtained a nurse's assessment for the Appellant's wife. The nurse reported that the Appellant's wife suffers from impairments in lower extremities only; that the Appellant's wife is totally incontinent in bladder function and sometimes incontinent in bowel function; and that the Appellant's wife needs the assistance of a person to transfer to walk or wheel inside and outside; get up from seated position; get up from bed; and transfer to wheelchair. The record further shows that the nurse's assessment in page 7 under "COMMENTS" indicates in part as follows: " Client (Appellant) requires a split-shift. She does not sleep at night, tries to climb over the side rails. She is great risk for falls."

The hearing record also includes the independent medical reviews by the Local Medical Director dated November 2, 2009 for the Appellant. A reading of the Appellant's November 2, 2009 review includes the LMD's statements as follows: " Given that the recipient's upper extremities are without motor/muscular impairments and without impairment of muscular coordination (Q p.2); and that his lower extremities are without motor/muscular impairment and only partially impaired with muscular coordination (Q p.2); then it cannot be that the recipient needs total assistance with feeding and or with toileting as so claimed by the Q.

Furthermore, the hearing record also includes the independent medical reviews by the Local Medical Director dated November 2, 2009 for the Appellant's wife. A reading of the Appellant's wife's November 2, 2009 review includes the LMD's statements as follows:

"Clearly, there are periods of time during the day and night when it is necessary for the actions/behaviors of the recipient to be directed and/or supervised by a self-directing informal caregiver on a part time or interim basis. Documents reviewed do not identify such a self-directing informal caregiver to be available, able and willing. Personal care services may only be provided to non-self-directing recipients if the responsibility for direction is assumed by another individual or agency (Fair Hearing #4257463Z / hearing date 01-31-2009/decision date: 05-172009/case # [REDACTED] / last paragraph of page 6). "

However, among the documents reviewed by the Agency's Local Medical Director is the Agency's social assessment of October 6, 2009 performed by the Agency's case manager also on October 6, 2009 which in page 5 of the Social Assessment and in paragraph B. entitled RELATIVES/FRIENDS/AGENCIES AND OTHER ADULTS NOT IN HOME includes the following responses to relevant questions: " Client's (Appellant's) daughter has power of attorney. (She) supervises client's care. Will sign 2131 assuming responsibility for above mentioned tasks. Client accepts daughter's involvement/ does not resist. "

Furthermore, the record in this case includes the form 2131 "AGREEMENT OF RELATIVE OR FRIEND TO PARTICIPATE IN HOME CARE SERVICES PLAN OF CARE" signed and completed by the Appellant's daughter, [REDACTED] on October 27, 2009 by which the aforesaid person has agreed to participate in the plan of care developed by the Home

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Care Services Program for the Appellant and the Appellant's wife.

At the hearing, the Appellant's witness (Appellant's daughter) testified that she resides only 45 minutes away from her parents' apartment; and that she participates during the day with her parents' plan of personal care but she cannot assist them during the night. The Appellant's daughter further testified that the Appellant cannot ambulate himself; that the Appellant's wife had fallen in August 2009 and since then she uses a wheelchair. The Appellant's representative also testified that both the Appellant and his wife due to their serious medical problems and their constant unscheduled needs during the night needs the assistance of a home attendant during the day and night. The Appellant's witness' testimony taking into consideration the Appellant's witness' total demeanor at the hearing was found to be persuasive.

Section 505.14(a) of the Regulations provides in part that: **Total assistance** shall mean that a specific function or task is performed and completed for the patient; and that **Continuous 24 hour personal care services** shall mean the provision of uninterrupted care, by more than one person, for a patient who, because of his/her medical condition and disabilities, requires total assistance with toileting and/or walking and/or transferring and/or feeding at unscheduled times during the day and night.

The record in this case establishes that the Appellant's physician and nurse's report found that the Appellant is incontinent in bladder control. Furthermore, the record shows that the Appellant's physician's report of September 29, 2009 stated that " The Appellant total grooming, total dressing, total washing, total bathing, total feeding, as well as total toileting: Bedpan and Commode."

Furthermore, the record establishes that Agency's Nurse recommends split-shift services for the Appellant's wife as the Agency's Nurse found the Appellant's wife is totally incontinent in bladder control. Implicitly, the nurse found Appellant's wife requiring assistance with toileting at unscheduled times, during the night.

The Agency's own evidence, therefore, includes substantial reasons to contradict the explicit conclusions of the Local Medical Director that " it cannot be that the recipient needs total assistance with feeding and or with toileting as so claimed by the Q." Furthermore, the Local Medical Director failed to address the Appellant's wife's needs during the night and particularly her inability to ambulate by herself and to also evaluate properly the Appellant's wife's needs during the night by considering the Appellant's wife's mental condition.

Nonetheless, there was significant medical evidence of Appellant's and the Appellant's wife's need for total assistance with physical tasks at unscheduled times, most notably, assistance with toileting, but, also, assistance with transferring, which medical evidence was presented to the Local Medical Director. Said medical evidence was amplified by additional evidence submitted at the hearing. It is noted that appropriate monitoring of the patient may be required as part of assisting Appellant and the Appellant's wife with particular tasks such as night toileting, but this is distinct from pure safety monitoring situations. GIS 03/MA/03.

Finally, the Appellant's representatives have pointed to evidence sufficient to establish Appellant's and his wife's needs for total assistance with toileting, and, apparently, with other tasks, at unscheduled times of the day and night. The Appellant's representatives further testified that the Appellant's and the Appellant's wife's needs cannot be provided on a regular basis by a relative who had agreed to participate in the Appellant's and the Appellant's wife's personal plan of care in this mutual case. The Appellant's representatives' arguments were found to be persuasive and credible.

DECISION AND ORDER

The Agency's determination dated November 4, 2009 to reduce the Appellant's Personal Care Services authorization from the amount of 24 hours daily, 7 days weekly, "split-shift" service, provided by more than one Personal Care Services aide to the amount of 24 hours daily, 7 days weekly, provided on a "sleep-in" basis, was not correct and is reversed.

The Agency's determination concerning the adequacy of Appellant's and his wife's ongoing Personal Care Services was not correct and is reversed.

1. The Agency is directed to cancel its Notice dated November 4, 2009 pertaining to the reduction of the Appellant's Personal Care Services from the amount of 24 hours daily, 7 days weekly, "split-shift" service, provided by more than one Personal Care Services aide to the amount of 24 hours daily, 7 days weekly, provided on a "sleep-in" basis.
2. The Agency is directed to increase Appellant's and the Appellant's wife's Mutual Personal Care Services to the amount of 24 hours daily, 7 days weekly, continuous care service, provided by more than one Personal Care Services aide.
3. The Agency is directed to continue to authorize Appellant and his wife to receive Personal Care Services in the amount of 24 hours daily, 7 days weekly, continuous care services.

Should the Agency need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant promptly in writing as to what documentation is needed. If such information is required, the Appellant must provide it to the Agency promptly to facilitate such compliance.

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As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
11/10/2010

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink that reads "D A Traumm". The signature is written in a cursive style with a long horizontal line extending from the top of the "m".

Commissioner's Designee